Supreme Court, U. S.
FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

No. 79-1406

IN THE

Supreme Court of the United States

October Term, 1979

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioner's Brief in Reply to Memorandum for the United States as Amicus Curiae.

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Petitioner, City of Los Angeles, is mindful that this Court frequently invites the Solicitor General to submit views prior to the Court's decision to grant or deny certiorari because the Government often brings an "important and sophisticated analysis"[1] to cases of constitutional import. In this instance, however, the amicus memorandum on behalf of the United States incorrectly characterizes the basis for the City's Petition for Certiorari.

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[1]*Government Litigation in the Supreme Court: The Roles of the Solicitor General,* 78 Yale L.J. 1480 (1969).

1. Contrary to the Solicitor General's suggestion, Petitioner is *NOT* urging that an airport proprietor is powerless to impose airport use restrictions and is, for that reason, immune from state imposed nuisance liability. Petitioner recognizes its power to impose reasonable, nondiscriminatory use restrictions which do not place an undue burden on interstate commerce. But, whether an airport proprietor has such a power is not relevant to the issue now before this court.

The issue is, rather, may the courts of the State of California regulate an airport by imposing nuisance liability on an airport proprietor for noise created by aircraft in flight? *Burbank*[2] held that Congress preempted a *non*-airport proprietor, the City of Burbank, from regulating an airport. Yet, the State of California is in the same position as the City of Burbank; both are *non*-airport proprietors. Regulation may take different forms. The City of Burbank attempted to regulate airports by imposing a nighttime curfew. The State of California through its court-system, is attempting to regulate by imposing tort liability on an airport proprietor through a nuisance statute. As stated in *Garmon,*[3] such an imposition of tort liability is a form of regulation.

2. As pointed out in the original Petition for Certiorari, *Luedtke's*[4] analysis of *Burbank* is diametrically opposed to that of the California Supreme Court in *Greater Westchester*. The Solicitor General dismisses this conflict by criticizing the Seventh Circuit's analysis in *Luedtke* as being "truncated". Further, no attempt is made to explain or analyze the conflict between *Greater Westchester* and

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[2]*City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

[3]*San Diego Building Trades Council v. Garmon*, 359 U.S. 236(1959).

[4]*Luedtke v. County of Milwaukee*, 521 F. 2d 387 (7th Cir. 1975).

Luedtke. Petitioner is unaware of any published decisions following either *Luedtke* or *Greater Westchester*. However, several recent unpublished decisions from the Georgia courts have refused to follow the reasoning of *Greater Westchester* adopting instead the rationale of *Luedtke*.[5]

3. The Solicitor General opines that this Court's ruling in *Griggs v. Allegheny County*[6] necessitates a ruling that an airport proprietor "is liable for torts as well as for takings." Such position fails to recognize the distinction between liability imposed by the Fourteenth Amendment for a taking of property (*Griggs*), and that imposed by state statute (*Greater Westchester*). In *Greater Westchester* an airport proprietor was mandated *legislatively* to pay nuisance damages. Congress could not have preempted, and thus prevented, the award of "taking" damages in *Griggs*, because Congress alone cannot override a constitutional mandate. However, Congress can, and has, in the interest of a uniform national transportation system, preempted the State of California, and its courts, both *non*-airport proprietors, from regulating an airport proprietor through the vehicle of a *legislatively* enacted and *judicially* enforced nuisance statute.

CONCLUSION.

Petitioner has come before this Court to advocate the preservation of an approach to noise regulation which is national in scope and uniform in effect. *Greater Westchester* represents a change in direction which, in the absence of a resolution by this Court, will foster a multitude of con-

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[5]See, e.g., *Owens et al. v. City of Atlanta*, No. C-31533, (Fulton County Superior Court, Georgia, filed March 28, 1980), see Appendix A.

[6]*Griggs v. Allegheny County*, 369 U.S. 84 (1962).

flicting decisions resulting in diversity rather than uniformity and divisiveness rather than cooperation.

Respectfully submitted,

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APPENDIX A.

Order.

In the Superior Court of Fulton County, State of Georgia.

Wes Owen, et al., Plaintiffs, vs. City of Atlanta, Defendant. Civil Action File No. C-31533.

Joe Moses, et al., Plaintiffs, vs. City of Atlanta, Defendant. Civil Action File No. C-31534.

Avis Crutchfield, et al., Plaintiffs, vs. City of Atlanta, Defendant. Civil Action File No. C-31535.

The Motion for Partial Summary Judgment, filed by the defendant, having come on regularly to be heard and having heard argument of counsel and having read and considered briefs and the entire record, the Court enters the following ORDER:

1. The plaintiffs here are homeowners and residents of College Park, Georgia, who live within a close proximity to the runways and taxiways of the Atlanta Airport.

The complaint alleges in Count I that aircraft making their approaches to the airport pass over the property of the plaintiffs approximately sixty per cent of the time, thus constantly invading and trespassing upon the airspace of the plaintiffs. The plaintiffs charge that the noise, smoke, raw fuel, and noxious odors emitted by the low-flying aircraft severely and substantially interfere with the residential use and beneficial enjoyment of ownership of the plaintiffs' property.

Count II of the complaint alleges that said emissions have caused a serious detrimental effect upon the lives and health of the plaintiffs and their families.

Count III alleges that said flights interfere with the use of the plaintiffs' property for residential purposes and constitute a trespass upon the plaintiffs' property.

Count IV alleges that the plaintiffs have suffered physical damages to their property caused by vibrations, air pressure waves, and corrosive pollutants.

2. The defendant, City of Atlanta, has moved for partial summary judgment on the ground that no genuine issues of material fact exist as to the plaintiffs' claims based upon nuisance and trespass from over-flight of aircraft.

The plaintiffs rely upon the recent case of *Greater Westchester Homeowner's Ass'n. v. City of Los Angeles,* 160 Cal.Rptr. 733 (1979). This case held that a municipality which owns and operates an airport is liable on a nuisance theory for personal injuries sustained by nearby residents caused by noise from aircraft using the facility.

The Supreme Court of the United States in *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624, considered a local ordinance which prohibited jet aircraft from taking off from the airport between the hours of 11:00 p.m. and 7:00 a.m. Mr. Justice Douglas writing for the Court, held that the Federal Aviation Act and Noise Control Act had pre-empted state and local control over aircraft noise. Federal Aviation Act of 1958, 49 U.S.C.A. §1301 *et seq.;* Noise Control Act of 1972, 86 Stat. 1234. The Noise Control Act, by definition, includes the sonic boom.

The U.S. Court of Appeals for the Seventh Circuit in *Luedtke v. County of Milwaukee,* 521 F.2d 387 (1975), noted that in the area of aircraft emissions, Congress had also preempted the field. *Washington v. General Motors Corp.,* 406 U.S. 109 (1972); *Virginians for Dulles v. Volpe,* 344 F.Supp. 573 (E.D. Va. 1972). The Court in *Luedtke* concluded:

> Since the federal laws and regulations have pre-empted local control of aircraft flights, *Burbank, supra,* the defendants may not, to the extent they comply with

> federal laws and regulations, be charged with negligence or creating a nuisance. *Id.* at 391.

In *Luedtke*, as in the case at bar, the plaintiff sought damages for operation of a nuisance.

The California Supreme Court in *Greater Westchester, supra*, made no effort to distinguish *Luedtke*, and attempted to distinguish *Burbank, supra* on the ground that it "refrained from imposing similar limitations on the rights and obligations of a proprietor-landlord to control aircraft noise levels."

Nor did the court in *Greater Westchester* overrule *San Diego Unified School District v. Superior Court for the County of San Diego and Roger A. Britt, et al.*, 67 Cal.Rptr. 557 (1977), *cert. den.*, 434 U.S. 1310 (1978). In *San Diego*, a group of homeowners brought an action based on nuisance, trespass and negligence for recovery of damages caused by aircraft flying to and from the airport. Relying upon *Luedtke*, the court said:

> ". . . In our view, civil damages for the noxious by-products of aircraft in flight . . ., are a form of state regulation in an area which must remain free of such regulation if national air safety, traffic and noise policy are to be left unhampered . . . We conclude that plaintiffs may not recover tort damages for harm caused by aircraft in flight.

While these cases are not controlling, the Court finds their logic compelling. To allow tort damages for nuisance and trespass, as alleged in the complaint would be to hold municipalities liable for the consequences of acts over which control has been pre-empted by the federal government.

As was pointed out by Mr. Justice Jackson in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303:

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They

> move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of controls.

The Supreme Court in *Burbank* concluded by recognizing that "fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded." *Burbank, supra,* at 1862.

Finally, the Court notes that the Georgia cases[1] that have addressed the issue of the liability of airports under theories of nuisance or trespass had been decided before the development of the pre-emption doctrine in this area.

3. For the above reasons, the Motion for Partial Summary Judgment, filed by the defendant, is hereby granted, and judgment entered in favor of the defendant as to Counts II, III, and IV of the complaint.

Let it be so ORDERED.

This 28th day of MARCH, 1980.

/s/JOEL J. FRYER
Judge, Fulton Superior Court, A.J.C.

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[1]*Thrasher v. Atlanta,* 178 Ga. 514; *Delta Air Corp. v. Kersey,* 193 Ga. 862; *Scott v. Dudley,* 214 Ga. 565; *Dyer v. Atlanta,* 219 Ga. 538; *City of Atlanta v. Donald,* 221 Ga. 135; *Chronister v. Atlanta,* 99 Ga. App. 447.

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